

Congress of the United States
House of Representatives
Washington, DC 20515

December 7, 2004

The Honorable Joel Hefley, Chairman
The Honorable Alan B. Mollohan, Ranking
Minority Member
House Committee on Standards of Official Conduct
HT-2 Capitol
Washington, DC 20515

Dear Mr. Chairman and Mr. Mollohan:

We are writing to seek clarification about the Committee's November 18, 2004, letter to Rep. Chris Bell. At the end of the letter, you articulated a new ethics policy, stating:

[W]e also wish to make the point to you — and, by public release of this letter, to all House Members and staff — that it is highly improper, and a basis for the initiation of disciplinary action, for any House Member or staff person to attack the integrity of this Committee or any of its members.

With due respect, we question the basis — and, indeed, the constitutionality — of this new policy. We have served in the House for decades, and we understand the important role played by the Ethics Committee. In fact, it is because of our longstanding commitment to welfare of this institution and its members that we are writing this letter. In our view, members of House have not only the right — but also the obligation — to speak out when they question the actions of the House or its committees.

We recognize that special rules of decorum govern what members may say on the floor of the House. But we have always understood that in communicating with other members, the public, and constituents, members retain their rights to express their opinions. We may not agree with statements that individual members make criticizing the Ethics Committee, but we do defend their right to voice their views.

In the past, there have been countless examples of House members who have spoken out against the actions of the Ethics Committee or its members. These statements often questioned the motives of the Committee or its members. Yet they were regarded as part of the occupational hazards that all committees and members of Congress inevitably face, not as a basis for disciplinary action.

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Recently, several House members criticized the Ethics Committee's decision to admonish Majority Leader Tom DeLay. For example, Rep. Tom Feeney said: "I don't know why the Republicans went along with this political hatchet job."¹ Rep. John Sweeney said: "The thing that's disconcerting for people is the ethics committee did a move that gives themselves cover and the standard they applied is a standard that didn't exist."² At the time, there was no suggestion that calling the actions of the Ethics Committee a "political hatchet job" would subject a member to potential discipline.

In 1997, Rep. John Boehner, who was then the chair of the House Republican Conference, attacked the motivations of the ranking member of the Ethics Committee, Rep. Jim McDermott, and called for his removal from the Committee. On a national news program, Rep. Boehner said: "Well, I think that the Ethics Committee ought to throw him off the Ethics Committee, because it's clear, as we've seen for weeks, that this is not an ethics case against Newt Gingrich. What that is, is a partisan political fight to reverse what — what the Democrats couldn't do at the ballot box, to try to take control of the Congress."³

Long before he became Speaker, Rep. Newt Gingrich criticized what he perceived to be inaction by the Ethics Committee. Referring to Democratic House members that he believed should be investigated, Rep. Gingrich said: "In each case, nothing was done by the only body within Congress, the Committee on Standards of Official Conduct, entrusted with the power to police the House. . . . The ethics committee seems to protect the institution rather than police it."⁴

This is not a partisan issue. Democratic members have also criticized the Committee or its members. For example, Mr. McDermott made this statement in 1997 about the Ethics Committee's investigation of Mr. Gingrich: "At every turn the Republican majority on the Committee has delayed, stonewalled, or otherwise obstructed sensible efforts to get at the whole truth. . . . Complaints lodged against Members of the Minority have been used as barter in negotiations over sanctions for the five instances in which the Committee found Speaker Gingrich to have violated House Rules."⁵ The year before, former Democratic Whip David

¹ *After Ethics Rebukes, DeLay's Fortunes May Now Lie with His Party's*, New York Times (Oct. 8, 2004).

² *Hefley: "I Was Threatened,"* The Hill (Oct. 13, 2004).

³ *Fox News Sunday*, Fox News (Jan. 12, 1997).

⁴ *House Rejects Outside Ethics Panel*, New York Times (July 1, 1987).

⁵ *Back to the Main Event: Counsel's Report on the Speaker Due Today*, Roll Call (Jan. 16, 1997).

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Bonior stated: "The ethics committee has done worse than stonewall — they are actively participating in a coverup on Newt Gingrich's behalf."⁶

A strict reading of the Committee's November 18 letter suggests that these statements would now trigger disciplinary action. And that's what has prompted our letter. The right to express dissent and disagreement — even if it involves strong language that may offend others — is fundamental to our system of government.

There is First Amendment precedent that bears upon these concerns. According to the Supreme Court, "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966). In this case, the Supreme Court held that the Georgia House of Representatives could not exclude an elected member from office for statements he made criticizing the federal government's Vietnam policy. In finding that the exclusion violated the representative-elect's First Amendment rights, the Court stated that the "interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators." *Id.* at 136.

Indeed, "the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted). Even for House staff, "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Id.* at 140.

The new ethics policy raises other concerns, too. We are not aware of any basis in the House rules for the new policy. The November 18 letter appears to create a rule for the Ethics Committee that does not apply to other House committees, yet it does not explain the basis for this disparate treatment. And the decision of the Committee to single out a comment by Rep. Bell's staff, while overlooking comments made by Republican members, suggests that the policy may be susceptible to selective enforcement.

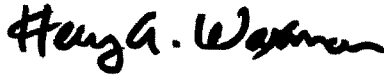
We appreciate the difficult work of the Ethics Committee, and we know that it can be a thankless job to sit in judgment over colleagues. We also believe that preserving the authority of the Committee and respect for its decisions should be of paramount importance to all members of the House. But having said this, we are concerned that the language of the November 18 letter is overly broad and could have a chilling impact on the rights of House members and staff to express criticism of the Ethics Committee.

⁶ *Democrats Press Ethics Panel to Step up Probe of Gingrich's Use of Nonprofits*, Washington Post (June 26, 1996).

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We respectfully request that the Committee reconsider this issue or provide further guidance to members.

Sincerely,



Henry A. Waxman
Ranking Minority Member
Committee on Government
Reform



David R. Obey
Ranking Minority Member
Committee on Appropriations



John D. Dingell
Ranking Minority Member
Committee on Energy and
Commerce